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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1750

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., AND WARREN G. SUNDAY,
Petitioners,

vs.

LINDA KAY SPARKMAN AND LEO SPARKMAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

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BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

To Plaintiffs' Complaint, Defendants, Warren G. Sunday, Harold D. Stump, John D. Hines, M.D., John C. Harvey, M.D., Harry M. Covell, M.D., and DeKalb Memorial Hospital, Inc. filed, among other responsive pleadings, Motions to Dismiss.

In his Memorandum of Decision and Order filed May 15, 1976, the United States District Court for the Northern District of Indiana, Fort Wayne Division, Jesse E. Eschbach, Judge, granted said motions stating that Defendant, Harold D. Stump, acting as a Circuit Court Judge in a State Court, was clothed with absolute judicial immunity and that Plaintiffs had no con-

stitutional claims which could be asserted against the remaining Defendants. The District Court's Memorandum of Decision and Order appears as *Sparkman* v. *McFarlin*, Civil No. F 75-129 (D. Ind., decided May 13, 1976). A copy of said Memorandum of Decision and Order was attached to Petitioners' Petition for Writ of Certiorari and is by that reference, incorporated herein.

An Appeal from the District Court's Order was taken by Plaintiffs to the United States Court of Appeals for the Seventh Circuit which Court, by Opinion rendered March 23, 1977 reversed the Judgment of the District Court and remanded the cause for further proceedings consistent with its Opinion. Said Opinion is reported at 552 F. 2d 172 (1977). A copy of said Opinion was attached to the Petition for Writ of Certiorari and is by that reference incorporated herein.

JURISDICTION.

The Opinion of the Court of Appeals was rendered on March 23, 1977. The Petition for Writ of Certiorari was filed on June 9, 1977 and granted on October 3, 1977. The jurisdiction of this Court rests upon 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the duly elected Judge of the Circuit Court of DeKalb County, Indiana, a Court of original, exclusive jurisdiction in all cases at law and equity whatsoever, had jurisdiction to consider and approve a Petition presented by Ora E. McFarlin, the natural mother, sole parent and custodian of Linda Kay Sparkman, her mentally handicapped fifteen year old daughter, to have an operation for tubal ligation performed on said Linda Kay Sparkman, and whether said act of approval is clothed with judicial immunity from liability under the federal civil rights statutes.

CONSTITUTION, FEDERAL AND STATE STATUTES.

United States Constitution, Amendment XIV, Section 1 provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U. S. C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U. S. C. § 1985(3) provides:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the law; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in

ized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."

Indiana Code § 16-13-13-1 (Repealed, 1974).

Authorization. Whenever the superintendent of any hospital or other institution of this state, or of any county in this state, which has the care or custody of insane, feeble-minded or epileptic persons, shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent, if a lawfully licensed physician or surgeon, is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, an operation or treatment of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeble-mindedness: Provided, That such superintendent shall have first complied with the requirements of this act [16-13-13-1—16-13-13-6]. [Acts 1927, ch. 241, § 1, p. 713; 1937, ch. 244, § 1, p. 1164].

Relevant portions of Indiana Code § 16-13-13-2 (Repealed, 1974). *Petition by superintendent to governing board—Notice—Hearing—Order.* A copy of said petition shall be served upon the inmate together with a notice in writing designating the time and place in said institution or elsewhere, not less than thirty [30] days before the presentation of such petition to said board, when and where said board may hear and act upon such petition. Such inmate shall be produced before such board of [at] such hearing.

Any party to said proceedings shall have the right to be represented by counsel at such hearings, and to cross-examine all witnesses produced by and who testify at the instance of the opposite party.

Relevant portions of Indiana Code § 16-13-13-3 (Repealed, 1974). *Appeal to Circuit Court—Stay of proceedings.* From any order so entered by the Indiana council for

furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

I. C. 1971, § 16-8-3-1 provides in part:

"Medical or Surgical Treatment of Incompetent—Consent. —Consent to medical or surgical treatment of a person (herein called the 'patient') incompetent to give such consent by reason of minority, insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness or drug addiction may be given by the following persons, and such consent shall, on and after July 6, 1961, be binding on the patient, his or her heirs, administrators, executors and personal representatives:

(a) If the patient is an unmarried unemancipated minor, by one (1) parent having custody of such minor, Provided, That if there is no such parent, by the legal guardian of the minor, and further Provided That if the patient is a neglected child, by the agency of which the child has been made a ward of the juvenile court; . . ."

I. C. 1971, § 16-8-4-2 provides:

"Consent of Parent to Medical Treatment of Child.—Any person who is the parent of a child shall be competent to give consent to and contract for medical or hospital care or treatment of such child including surgery."

I. C. 1971, § 33-4-4-3 provides:

"*Jurisdiction.*—Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships: Provided, however, That in counties in which criminal or superior courts exist or may be organ-

mental health [commissioner of mental health] the said inmate or his guardian or parent or next friend shall, within thirty [30] days after the date of such order, have an appeal as of right to the circuit court of the county in which said institution is situated, . . .

The pendency of such appeal shall stay proceedings under the order of the council [commissioner of mental health] until the appeal be determined.

Indiana Code 16-13-13-4 (Repealed, 1974). *Appeal from circuit to Supreme Court—Act of 1927.*—Any party to appeal in the circuit court may within thirty [30] days after the date of the final order therein, apply for an appeal to the Supreme Court, which Supreme Court may grant or refuse such appeal and shall have jurisdiction to hear and determine the same upon the record of trial in the circuit court and to order the circuit court to make in the matter such order as may to the Supreme Court seem proper. The pendency of an appeal in the Supreme Court shall operate as a stay or proceedings under any orders of the board or of the circuit court until the appeal be determined by the Supreme Court. [Acts 1927, ch. 241, § 4, p. 713.]

STATEMENT OF THE CASE.

When Plaintiff, Linda Kay Sparkman, was fifteen (15) years old, her mother, Ora E. McFarlin, determined that it would be advisable to have Linda undergo a tubal ligation. The ostensible grounds for this decision were that, according to her mother, "Linda was somewhat retarded", unable to progress further than a 3rd grade scholastic level at school, unable to respond effectively to efforts at vocational training, that without her mother's consent or knowledge, Linda had been staying over night with older youths and men, and that her mother was unable to maintain control and observation over Linda to "prevent unfortunate circumstances". As a result, her mother sought the services of Defendant attorney, Warren G. Sunday, who prepared a certain "Petition To Have Tubal Ligation Performed On Minor and Indemnity Agreement." (A. 25).

By this document, Mrs. McFarlin consented to the performance of the operation, and agreed to indemnify and hold harmless the attending surgeon and the hospital from any liability growing out of the operation. This Petition was thereafter presented to Defendant, Harold D. Stump, Judge of the Circuit Court of DeKalb County, Indiana, who "approved" the *ex parte* application. Thereafter, on July 16, 1971, the three Defendant doctors performed a reversible tubal ligation on Linda at the Defendant Hospital.

In ruling on the Motions To Dismiss filed by all Defendants except Defendant, Ora E. McFarlin, the United States District Court For the Northern District of Indiana, Fort Wayne Division, held, with respect to the question here presented, that the only State action involved was that of Judge Harold D. Stump as Judge of the DeKalb Circuit Court, Indiana, "approving" Defendant, Ora E. McFarlin's Petition and held further that since the Circuit Courts of Indiana are Courts of general juris-

diction having "original, exclusive jurisdiction in all cases at law and in equity whatsoever" (I. C. 1971 § 33-4-4-3), Judge Harold D. Stump had jurisdiction in his Court to consider a Petition For Tubal Ligation; and although said "approval" may in retrospect have appeared to have been premised on an erroneous view of the law, the fact that subject matter jurisdiction resided in Judge Harold D. Stump, clothed the act with absolute judicial immunity from liability under 42 U. S. C. § 1985(3) or under the Fourteenth Amendment.

The United States Court of Appeals For the Seventh Circuit, by Opinion dated March 23, 1977 (p. A8 Appendix—Petition For Writ of Certiorari), reversed. Ignoring the statute conferring general jurisdiction upon the DeKalb Circuit Court (I. C. 1971 § 33-4-4-3) which states: ". . . and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer and ignoring those statutes providing for parental consent to perform surgery upon a minor (I. C. 1971, § 16-8-3-1, 2 and 3), the Court of Appeals without citing any authorities therefor, held, as a matter of law, that "a claim must be characterized as a case in law or in equity in order to come within the statute" (p. A 11, Appendix to Petition For Writ of Certiorari).

SUMMARY OF ARGUMENT.

In the year 1971 when DeKalb Circuit Court Judge, Harold D. Stump, undertook to sign the Approval, the General Jurisdiction Statute, I. C. §33-4-4-3 was in effect. This gave the Judge jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.

In 1971 there was likewise in existence the statutes at I. C. § 16-8-3-1 and I. C. § 16-8-4-2 which provided for medical or surgical treatment of an incompetent and that consent for such treatment may be given by the parent having custody of such minor. The statutes further provide that any person who is a parent of a child shall be competent to give consent to and contract for medical or hospital care or treatment of such child including surgery.

The General Jurisdiction Statute had never been construed in any narrow fashion by any Indiana court prior to 1975. Nor had the statute conferring the right to consent by a parent for surgery on a minor child been construed so as to prevent that statute from embracing sterilization. Additionally, those statutes concerning authority to consent to medical treatment of an incompetent (I. C. § 16-8-3-1 and I. C. § 16-8-4-2) do not provide, by their terms, for any formal context in which the consent is to be given.

Judges are immune from civil actions for acts performed in the course of their official functions. *Bradley* v. *Fisher*, 80 U. S. 335, 20 L. Ed. 646 (1871). Unless an act is done in the clear absence of all jurisdiction and this fact is known to the judge, there is no immunity. *Bradley* v. *Fisher, supra, Rhodes* v. *Houston*, 202 F. Supp. 624 (D. C. Nebr. 1962).

Whenever a court's general jurisdiction over the subject-matter is invoked, the court has the right to determine if it has the power to determine if it has jurisdiction to proceed to dispose of the matter. *Bradley* v. *Fisher, supra; Baltimore & Ohio Railway Co.* v. *Freeze,* 82 N. E. 761, 169 Ind. 370 (1906); *Johnson* v. *McCoy,* 278 F. 2d 37, 40 (9th Cir. 1960). In the year 1971, Judge Stump clearly had jurisdiction over the subject-matter of sterilization and he had the further right to determine if he had jurisdiction to act on the Petition in question. *A. L.* v. *G. R. H.,* 325 N. E. 2d 501 (Ind. App. 1975). It was four years later, that the Indiana Appellate Court held that parents may not be authorized by courts of general jurisdiction to cause tubal ligations to be performed on their children. *A. L.* v. *G. R. H., supra.* That decision did not, however, remove jurisdiction of the subject-matter from the Circuit Courts of Indiana. *Id.*

Judicial immunity is not lost through procedural errors, irregularities or deficiencies of a circuit court judge's acts. *Sullivan* v. *Kelleher,* 405 F. 2d 486 (1st Cir. 1968); *Jacobson* v. *Schaefer,* 441 F. 2d 127 (7th Cir. 1971).

There are numerous cases holding that so long as subject-matter jurisdiction of a court is invoked, subsequent procedural irregularities will not destroy the court's immunity. *Williams* v. *Sepe,* 47 F. 2d 913 (6th Cir. 1973); *Perkins* v. *United States Fidelity & Guaranty Co.,* 433 F. 2d 1303 (5th Cir. 1970); *Quindlen* v. *Hirschi,* 284 P. 2d 723 (Okl. 1955).

The act of Approval of the Petition in question was done by Judge Stump in the exercise of his judicial function. The act of Approval had not been proscribed at the time of its occurrence. *Meredith* v. *Van Oosterhout,* 286 F. 2d 216 (8th Cir. 1960), *cert. den.* 365 U. S. 835. The act of Approval had not been proscribed at the time of its occurrence.

The policy underlying the doctrine of judicial immunity requires that its application not depend on determination of nice questions of jurisdiction. *Sullivan* v. *Kelleher, supra; Williams* v.

Sepe, supra; Ray v. *Huddleston,* 212 F. Supp. 343, 345-46 (W. D. Ky. 1963), aff'd. 327 F. 2d 61. The terms "jurisdiction" and "judicial function" are given broad definition. *Sullivan, supra.*

Only clear absence of all jurisdiction will bring about a denial of immunity. *Bradley* v. *Fisher, supra.* Further, the fact of absence of jurisdiction must be known to the court, *Bradley* v. *Fisher, supra.* No evidence nor inference of such knowledge is here present. In fact, Judge Stump at all times possessed subject-matter jurisdiction over the subject of the Petition in question. *A. L.* v. *G. R. H., supra*

The Opinion of the Court of Appeals is erroneous in that it ignores the clear principles set down by *Bradley* v. *Fisher, supra,* to which principles the Court of Appeals was bound. If Judge Stump erred at all, it was a good faith error entitled to judicial immunity.

ARGUMENT.

I.

THE DEKALB COUNTY CIRCUIT COURT OF WHICH HAROLD D. STUMP IS PRESIDING JUDGE WAS AT ALL TIMES PERTINENT TO THIS LITIGATION A COURT OF ORIGINAL, EXCLUSIVE, GENERAL JURISDICTION OVER ALL CAUSES, MATTERS AND PROCEEDINGS EXCEPT THOSE EXPRESSLY REMOVED FROM IT.

As Judge of the Circuit Court of DeKalb County, Indiana, (Complaint, p. 3, ¶ 6) Appellant, Harold D. Stump's, authority is derived from the following:

Art. 7, § 8 of the Constitution of the State of Indiana provides:

> "The Circuit Court shall have such and criminal jurisdiction as may be prescribed by law."

Indiana Code § 33-4-4-3 provides:

> "Jurisdiction. Said court shall original, exclusive jurisdiction in all cases at law and in equity whatsoever as in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon Justices of the Peace. It shall also have exclusive jurisdiction of the settlement of decedent's estates and of guardianships: provided, however, that in counties in which Criminal or Superior Courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such Appellate jurisdiction as may be conferred by law, *and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.* (Emphasis added.) [Acts 1881 (Special Session), Chapter 24, Section 3, page 102.]"

"Jurisdiction", a fundamental generic term has been defined variously in *Black's Law Dictionary*, revised 4th Ed., p. 991 as follows:

> The word is a term of large and comprehensive import, and embraces every kind of judicial action. *Federal Land Bank of Louisville, Kentucky* v. *Crombie*, 258 Ky. 383 80 S.W. 2d 39, 40; *McGowin* v. *McGowin*, 122 Fla. 394 165 So. 274, 275, 76. . . .
>
> (P. 992) "Jurisdiction of subject-matter" means jurisdiction of class of cases to which particular case belongs. *McFarlin* v. *McFarlin*, 384 Ill, 428, 51 N.E. 2d 520, 521;. . . . It is power to: ajudge concerning general question involved, *Parker Bros.* v. Fagen, C.C.A. Fla., 68 F2d 616, 617 . . . deal with general abstract question, to hear particular facts in any case relating to such question, and to determine whether they are sufficient to invoke exercise of power, *Melton* v. *Jenkins*, 50 Ga. App. 615, 178 S.E. 754. . . .
>
> "Jurisdiction of the person" is power to subject parties in a particular case to decisions and rulings made in such case, *Collins* v. *Powell*, 224 IA. 1015, 277 N.W. 477, 481.

In attempting definition by way of exclusion, *Black's, supra*, says at p. 992:

> Its [jurisdiction] does not depend either upon the regularity of exercise of power to hear and determine or upon correctness or rightfulness of decision made, *Mattice* v. *Kingston Chess Co.*, 33 N.Y. Supp. 2d 799, 801 . . .; or on the ability of the judge to reason correctly or to act incorruptibly. *In Re: Gardiner's Estate*, 45 Cal. App. 2d 559, 114 P. 2d 643.

II.

THE DOCTRINE OF JUDICIAL IMMUNITY PROTECTS A JUDGE FROM CIVIL LIABILITY FOR ANY ACT WITHIN HIS JURISDICTION DONE IN THE EXERCISE OF HIS JUDICIAL FUNCTION.

Controlling principles involved in the doctrine of judicial immunity are as follows:

As a general rule judges are immune from civil actions for acts performed in the course of their official functions. This was the settled law of England and is similarly accepted in this country. *Bradley* v. *Fisher, supra.*

The passage of the Federal Civil Rights Act did not abrogate this traditional immunity. *Pierson* v. *Ray,* 386 U. S. 547, 87 S. Ct. 213, 80 L. Ed. 2d 288 (1967).

An exception to the rule of judicial immunity exists which is founded upon a distinction between *excess* of jurisdiction and the absence of all jurisdiction. *Bradley* v. *Fisher, supra.* Where there is jurisdiction over the subject matter, there is immunity, and even though a judge's action is in excess of jurisdiction the immunity remains.

Where the act is done in the *clear absence* of all jurisdiction and this is known to the judge, there is no immunity. *Bradley* v. *Fisher, supra.*

Cf. Rhodes v. *Houston,* 202 F. Supp. 624 (D. C. Nebr. 1962). *Bradley* v. *Fisher* holds: (20 L. Ed. 651))

> ". . . that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority and for the exercise of such authority when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend."

III.

A COURT OF GENERAL JURISDICTION POSSESSES THE POWER OF DETERMINING ITS OWN JURISDICTION.

By way of example and of particular importance to the facts of this case is the following pronouncement contained in *Bradley* v. *Fisher, supra:* (20 L. Ed. 651) . . .

> "Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But, if on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense which is not by the law made an offense and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked."

This statement provides two fundamental foundational precepts: (1) unless the act of a judge of a court of general jurisdiction has been proscribed, that is, his jurisdiction to act limited or removed by statute or by judicial fiat, the act of a judge, sitting in his judicial capacity, is clothed with judicial immunity; and (2) given subject-matter jurisdiction, each court has jurisdiction to determine its own jurisdiction.

The latter fundamental rule is established Indiana and federal law.

"Every court possesses the power of determining its own jurisdiction, both as to the parties and the subject matter of the action. It is well settled that, when an inferior tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its judgment thereon is conclusive against collateral attack, unless the want of jurisdiction is apparent on the face of the proceedings. A decision on a jurisdictional question, either expressly or impliedly given by a tribunal, has the same binding effect upon the parties as a decision on any other matter within its cognizance in any pending case or proceedings, and an error in this respect must be corrected in the same manner as other errors are authorized to be corrected." *Baltimore & Ohio Railway Company* v. *Freeze*, 82 N.E. 761, 169 Ind. 370 (1906).

Cf. *Waugh* v. *Board of Commissioners of Montgomery County*, 115 N.E. 356, 64 Ind. App. 123 (1917).

See also *Johnson* v. *McCoy*, 278 F. 2d 37, 40 (9th Cir. 1960).

As to the fundamental rule (1) stated above, Respondents have produced no judicial decision or statute proscribing, in the year 1971, the act of Judge Stump of which they complained nor limiting his jurisdiction over the subject matter contained in the Petition in question.

"Jurisdiction" to hear Ora McFarlin's Petition was present in the DeKalb Circuit Court by virtue of the broad jurisdictional powers conferred upon it [I. C. § 33-4-4-3]. The Federal District Judge in its Memorandum of Decision and Order dismissing Respondents' Complaint found that although Judge Stump's "approval" of Mrs. McFarlin's Petition may have been premised on an erroneous view of the law, "Judge Stump surely had jurisdiction to consider the Petition and to act thereon" (Appendix to Petition for Writ of Certiorari, A6).

Likewise, in the year 1971, there was in full force and effect in the State of Indiana the following statutes:

"I.C. § 16-8-3-1. Medical or Surgical Treatment of Incompetent—Consent. Consent to medical or surgical treatment of a person (herein called the 'patient') incompetent to give such consent by reason of minority, insanity, mental illness, imbecility, idiocy, senility, habitual dunkenness or drug addiction may be given by the following persons and such consent shall on and after July 6, 1961, be binding on the patient, his or her heirs, administrators, executors and personal representatives:

(a) If the patient is an unmarried, unemancipated minor, by one (1) parent having custody of such minor, provided, that if there is no such parent, by the legal guardian of the minor, and further provided that if the patient is a neglected child, by the agency of which the child has been made a ward of the Juvenile Court; . . ."

and

"I.C. § 16-8-4-2. Consent of Parent to Medical Treatment of Child. Any person who is a parent of a child shall be competent to give consent to and contract for medical or hospital care or treatment of such child including surgery."

Although these statutes were later held not to permit parents to consent to tubal ligation, that pronouncement had not been made prior to 1971. Prior to that year no judicial determination had been made in the State of Indiana construing or delimiting what surgery might be consented to by the parents or approved by a Circuit Court Judge.

Nor do these statutes provide, by their terms, any formal or procedural requirements for giving the consent. By submitting her Petition, "Mrs. McFarlin consented to the performance of the operation. . . ." (Memorandum of Decision and Order, Appendix to Petition for Writ of Certiorari, p. A3).

The observation by the Court of Appeals that ". . . the Petition and Order [*sic*] were never filed in court" suggests that filing in court in an apparently formal way is an absolute antecedent requirement to Judge Stump's having jurisdiction to act in approving the Petition is therefore erroneous.

In 1975, the Indiana Appellate Court in *A. L.* v. *G. R. H.*, 325 N. E. 2d 501 (Ind. App. 1975) held that parents may not be authorized by courts of general jurisdiction to cause tubal ligations to be performed on their children under any circumstances. The Decision did not, however, remove jurisdiction of such subject matter from the circuit courts. It simply issued a judicial fiat prohibiting such authorizations. Nowhere is it suggested that should such a Petition be presented to a judge of a circuit court in any county in Indiana that he did not have jurisdiction to deal with the Petition.

IV.

JUDICIAL IMMUNITY IS NOT LOST THROUGH PROCEDURAL ERRORS, IRREGULARITIES OR DEFICIENCIES OF A CIRCUIT COURT JUDGE'S ACTS. AN "APPROVAL" IS NOT AN "ORDER."

Circuit Court judges in Indiana, and specifically Judge Stump as Circuit Court Judge of DeKalb County, are frequently called upon in their judicial capacities to approve matters with which they are confronted. The statute conferring jurisdiction on circuit courts (I. C. § 33-4-4-3) provides:

> ". . . and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."

Judicial notice is to be taken of the routine practices of state courts of general jurisdiction in approving settlements of claims of minors for a personal injury upon the presentation of a petition requesting such approval by one or both of the natural parents or guardians of the minor and frequently in the minor's absence. Vital issues involving custody of minor children are frequently decided in the absence of the minor involved. If, in each such instance, guardians *ad litem* are required for such children who in turn would employ counsel, the judicial process would founder.

Grow v. *Fisher*, 523 F. 2d 875 (7th Cir.) (1975) held that an act of a prosecuting attorney in approving an affidavit which brought about the arrest of the plaintiff on charges which he knew were false and upon which each of the plaintiff was acquitted, was held to be an act entitling the prosecuting attorney to immunity from the consequences thereof. The court said:

> "The law of this circuit is clear. A state prosecutor has quasi-judicial immunity even where malice is alleged so long as he is acting within the scope of his prosecutorial discretion."

Surely if a prosecuting attorney acting within the scope of his prosecutorial discretion is immune from the consequences of his act of approval of an affidavit which he knows is false, a circuit court judge possessing original, exclusive general jurisdiction should be clothed with absolute immunity for the judicial act of approving the petition in question.

The fact that Judge Stump may have committed a procedural error does not deprive him of judicial immunity. In *Sullivan* v. *Kelleher*, 405 F. 2d 486 (1st Cir. 1968) a judge was sued for entering a default judgment evicting the plaintiff from his rented residence without giving him legal notice of the action although it was well-known that at the time the plaintiff was away from home on an extended trip. The court said:

> "For the soundest reasons of policy it has long been established that when a judge has general jurisdiction over the subject matter he is not civilly liable for acts done in the exercise of his judicial function. *Bradley* v. *Fisher*, supra. But this does not mean that judicial immunity hangs upon the determination of nice questions of jurisdiction which as the court pointed out in *Bradley* v. *Fisher*, at p. 352 can be 'some of the most difficult and embarrassing' that a judicial officer may be called upon to consider and decide. The distinction which must be observed is 'between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter."

In *Jacobson* v. *Schaefer*, 441 F. 2d 127 (7th Cir. 1971) County Judge Schaefer arbitrarily and shockingly withdrew from the amount of bail posted by plaintiff a sum to pay the fees of a court appointed attorney, and immediately thereafter found the plaintiff to be in default of his bail bond inasmuch as there was no longer the required amount on deposit, caused the plaintiff to be jailed and ordered that the deficiency could not be made up without court approval.

The court noted *Luttrell* v. *Douglas*, 220 F. Supp. 278 (7th Cir. 1963) holding that the doctrine of judicial immunity would not apply to the commission of a "clearly illegal act" on the part of the judge. The court noted that in *Luttrell*, the judge there had been specifically proscribed from performing the act of which he was guilty.

In applying the doctrine of judicial immunity to County Judge Schaefer, the court said:

> "(p. 130) We have found nothing in the Wisconsin Statutes which expressly grants to judges in criminal cases the authority to attach conditions to bail that do not directly relate to assuring the criminal defendant's appearance at trial. However, we think that, in terms of a judge's 'general jurisdiction over the subject matter', the defendant judge here probably had minimal jurisdiction to attach at least some conditions to bail. (Citing cases) . . . Obviously, the use of his jurisdiction to coerce reimbursement of allegedly illegal fees were the clear abuse of power, especially when other channels existed for recovery of any such fees which might have been owed. . . . But the fact that an abuse occurred did not destroy the defendant judge's original jurisdiction as that term has been defined in the judicial immunity cases. *Unlike the Luttrell case, there was no definitive statutory or common law bar to the present judge's action. Under these circumstances the judicial immunity doctrine must be applied.*" [Emphasis supplied.]

In *Williams* v. *Sepe*, 47 F. 2d 913 (5th Cir. 1973), it was established that Judge Sepe failed to comply with the procedure

for prosecuting an indirect contempt of court by failing to give written notice of the criminal contempt charged. Plaintiff alleged that such failure resulted in an absence of subject matter jurisdiction and the loss of the defense of judicial immunity. The court said:

> "While it may be true that the procedural irregularities would necessitate a reversal of a conviction if one had been obtained on the facts of this case . . . the test for the abrogation of judicial immunity is whether there is a *clear* absence of all jurisdiction over the subject matter. *Bradley* v. *Fisher*, supra. The policy underlying the doctrine requires that its application not depend on the determination of 'nice questions of jurisdiction'. *Sullivan* v. *Kelleher*, supra. The defects in the procedure employed in this case will not support a conclusion that there was a clear absence of all jurisdiction."

Perkins v. *United States Fidelity & Guaranty Co.*, 433 F. 2d 1303 (5th Cir. 1970) involved an action by a plaintiff against a judge of a probate court which had, upon application of plaintiff's wife to cause plaintiff to be committed to the Alabama State Hospital for the insane, signed a certificate of mental disqualification and ordered plaintiff committed. No hearing was held and plaintiff *Perkins* received no notice of any commitment proceedings.

Plaintiff alleged absence of jurisdiction and that the act of the judge was ministerial as opposed to being judicial. In rejecting the plaintiff's arguments, the court said:

> "The clear words of the statute grant the Probate Court jurisdiction over the application for commitment. Assuming that the Probate Judge did not provide Appellant with all the procedural safeguards provided in the statute, that would not destroy the jurisdiction of the court to hear and decide the case. Cf. *Headley* v. *Ball*, 284 Ala. 488 226 So. 2d 90 (1969)."

In *Potter* v. *LaMunyon*, 389 F. 2d 874 (10th Cir. 1968) the court noted that the State of Oklahoma had adopted the rule set down in *Bradley* v. *Fisher, supra* including:

> "(p. 876) The distinction to be drawn is between utter and complete lack of jurisdiction and errors in the exercise of a conferred general jurisdiction."

Among the cases cited in *Potter* v. *LaMunyon*, is *Quindlen* v. *Hirschi*, 284 P. 2d 723 (Okl. 1955) which involved a factual situation strinkingly similar to the one occupied by Respondents in this case. In *Quindlen*, the court held that a judge with jurisdiction to commit for insanity was not liable civilly for doing so erroneously by failing to serve legal notice on a 16 year old minor and failing to appoint a guardian *ad litem* to protect her interests. Quoting from *Comstock* v. *Eagleton*, 11 Okl. 487, 69 P. 955, 957, 196 U. S. 99, the court made the inquiry:

> " 'Under what circumstances can a judge of the probate court be held liable to a civil action for damages for an act done by him in his capacity as judge? Nothing is more essential and important than that the judiciary shall be independent. . . .' "

All cases cited by plaintiff were deemed not applicable "for the reason that they involved situations where the judge was wholly without jurisdiction" (p. 725).

Prior to his rendering the Opinion in *Bradley* v. *Fisher*, Mr. Justice Field had also written the Opinion in *Randall* v. *Brigham*, 74 U. S. 285 (1869), decided two years earlier. Attorney Randall took unconscionable advantage of a client. A letter from the ship's captain to a grand jury foreman disclosed the misconduct. The letter was shown to the judge. The judge, apparently taking the facts disclosed in the letter as being absolutely true sent for Randall and in open court notified him, orally, that his conduct and fitness would be considered five days hence. Five days hence, Randall was disbarred by the court. He was charged with no formal complaint, no specifications of charges

and given no formal citation. This failure, he advised, deprived the court of jurisdiction over him.

Justice Field noted that Superior Courts of Massachusetts are courts of general jurisdiction. He likewise noted that admission and removal of attorneys to practice before the courts are judicial acts. He stated:

> "Now, it is a general principle applicable to all judicial officers that they are not liable to a civil action for any judicial act done within their jurisdiction." (p. 291).

Later on in the Opinion (p. 293), the court said:

> ". . . the information imparted by the letter was sufficient to put into motion the authority of the court."

All of the foregoing cases sustain the fundamental principle that unless an act by a judge in a court of general jurisdiction has been specifically proscribed, it is clothed with judicial immunity so long as the matter with which the court was confronted gives the court subject-matter jurisdiction to act upon it.

V.

AT ALL PERTINENT TIMES, JUDGE STUMP ACTED IN HIS JUDICIAL CAPACITY. JUDICIAL IMMUNITY EXISTS FOR ANY ACT DONE BY A JUDGE IN THE EXERCISE OF HIS "JUDICIAL FUNCTION".

The Approval appended to the Petition was a judicial function of Harold D. Stump solely in his role as Judge of the DeKalb Circuit Court. It cannot be seriously contended that the Petition was presented to him in any other capacity. Assertions by Respondents in their Appellate Brief to the Court of Appeals that Judge Harold D. Stump was not acting under the jurisdiction conferred upon him as a Circuit Court Judge at the time of his Approval of the Petition are erroneous.

In 1971, there was but one court of general jurisdiction in DeKalb County, to-wit: the Circuit Court over which Judge

Stump presided. Under those conditions, all matters coming before that court were subject to the general jurisdiction of said court pursuant to I. C. § 33-4-4-3. See *Harris* v. *Souder,* 119 N. E. 2d 8 (Ind. Supreme Court 1954).[1]

Although some of the averments in the Petition might be descriptive of acts of juvenile delinquency, the Petition was not in any way construed as charging a criminal offense, adult or juvenile. The Petition was acted upon by Judge Harold D. Stump in the exercise of his general, exclusive jurisdiction.

In addition to cases which define judicial immunity in terms of "jurisdiction", there are also cases which define it in terms of "judicial function". *E.g. Skolnick* v. *Campbell,* 454 F. 2d 531 (7th Cir., 1971); *Stift* v. *Lynch,* 267 F. 2d 277 (7th Cir. 1959); *Barksdale* v. *Ryan,* 398 F. Supp. 700 (N. D. Ill. 1974); *Meredith* v. *Van Oosterhout,* 286 F. 2d 216 (8th Cir. 1960), *cert. den.* 365 U. S. 835.

In *Meredith* v. *Van Oosterhout, supra,* at 220, the court said:

> ". . . A judge may not be liable civilly for acts done in the exercise of his judicial functions, no matter how illegal, erroneous or irregular the acts may be. The rule is applicable even if the acts be performed maliciously, correctly or in excess of his jurisdiction. Sound considerations of public policy require that the judiciary be independent, with freedom to make unbiased decisions in no way controlled or influenced by fear of personal consequences, such as civil suits for imagined or even real impropriety."

A finding of the complete absence of "judicial function" is extremely rare. *E.g. Spires* v. *Botteroff,* 317 F. 2d 273 (7th Cir. 1971), (self-disqualified judge subsequently interfering with hearing, knowingly making a false affidavit, and intimidating a public defender); *Gregory* v. *Thompson,* 500 F. 2d 59 (1974) (assault); *cf., Skolnick* v. *Campbell, supra* (assault).

1. *Hicks* v. *State,* 230 N. E. 2d 757 (Ind. S. Ct. 1957) only partially overruled *Souder* in that it held where a juvenile offender comes before the Circuit Court's criminal jurisdiction, the court must sit as Juvenile Court in dealing with him. Here Judge Stump was exercising civil jurisdiction.

A judge's decision-making, whatever its form, is well within the confines of "judicial function". *E.g. Perkins* v. *U. S. F. & G. Co., supra* (responsibility of deciding whether a person should be committed to state mental institution held to be "judicial function" protected by immunity); *Barksdale* v. *Ryan, supra* (ordering bail money to be released to an allegedly unauthorized party held to be within the "judicial function" and hence protected by judicial immunity).

In *Schmidt* v. *Degen,* 376 F. Supp. 664, 669 (E. D. Pa. 1974), the court observed:

> ". . . [a] judge's decision-making function is by definition 'discretionary.' For this reason, the 'discretionary'—'ministerial' distinction is seldom employed in the judicial context."

Therefore, acts done in the exercise of a judge's "judicial function '—of which the giving of an approval is a part,—are entitled to judicial immunity.

VI.

IN APPLYING THE DOCTRINE OF JUDICIAL IMMUNITY, THE TERMS "JURISDICTION" AND "JUDICIAL FUNCTION" ARE GIVEN BROAD DEFINITION.

In *Apton* v. *Wilson,* 506 F. 2d 83, 90 (D. C. Cir. 1974), the court said:

> "The immunity of judges has long been settled. The judge is not liable for any injuries resulting from acts within his jurisdiction, and jurisdiction is construed broadly so that a judge will not be held liable unless he acts without color of authority."

With respect to "judicial function", *Skolnick* v. *Campbell supra,* held:

> "The standard for defining conduct encompassed by the 'judicial function' has been broadly construed in this circuit. . . ."

In *Williams* v. *Sepe, supra,* at p. 914, the court said:

> ". . . the policy underlying the doctrine [of judicial immunity] requires that its application not depend on the determination of 'nice questions of jurisdiction'." *Sullivan* v. *Kelleher, supra.*

The case of *Ray* v. *Huddleston,* 212 F. Supp. 343, 345-46, (W. D. 1963), *aff'd.* 327 F. 2d 61, suggests the tenor to be adopted by a reviewing court regarding subject-matter jurisdiction of a lower court of general jurisdiction:

> "Subject-matter jurisdiction is very often a question as to which there is no clear and compelling answer and it is not apparent how the interests of the public in immunity of judicial decisions is any less demanding in this field than in any other. . . . On the other hand, the illustration for the exception to immunity offered in *Bradley* v. *Fisher,* is convincing that in some cases at least it may have a solid basis. A probate court assuming to administer the criminal laws would surely surrender its immunity but in such a case jurisdiction would be so clearly lacking as to constitute usurpation rather than a mistaken overreaching. This concession to the exception in the rule of immunity may well call for some exploration as to the basis of jurisdiction but it does not allow detailed scrutiny and independent judgment. . . . This court is therefore not permitted to undertake a search for error in the county judge's determination on jurisdiction but will only look for some plausible basis for it."

VII.

ONLY CLEAR ABSENCE OF ALL JURISDICTION OVER THE SUBJECT-MATTER AND THAT FACT KNOWN TO THE JUDGE WILL BRING ABOUT A DENIAL OF IMMUNITY.

In the year 1971, there was no proscription, by statute or judicial fiat, depriving Judge Harold D. Stump of jurisdiction over the subject-matter presented in the Petition in question. The statutory scheme referred to by the Court of Appeals (Appendix to Petition for Writ of Certiorari, A12) does not, by its terms, negate sterilization under any other circumstances. Said scheme does not, by its terms, proscribe sterilization of persons other than institutionalized persons.

As previously stated in this brief, *A. L.* v. *G. R. H., supra,* does not remove jurisdiction from Circuit Courts to consider matters concerning sterilization but simply removes the authority from the court which would invest parents with the power to cause their children to be sterilized. From and after April 10, 1975, all Circuit Court Judges in the State of Indiana, including Judge Harold D. Stump, were aware of the fact that the decision in *A. L.* v. *G. R. H., supra,* deprived them of authority to permit parents the power to sterilize their children, but said courts were not deprived of jurisdiction to consider and act upon petitions requesting such authority.

No statute or judicial decision was in effect in 1971 which deprived Judge Stump of his jurisdiction to deal with the Petition for Tubal Ligation or which proscribed him from giving his approval. Clear absence of all jurisdiction to thus act could not, therefore, have been known to him for the reason that he had, in fact, possession of jurisdiction over the subject-matter of the Petition.

Wade v. *Bethesda Hospital,* 337 F. Supp. 671, 356 F. Supp. 380 (S. D. Ohio 1971-1973) presents a situation whereby a Probate Court Judge, exercising limited jurisdiction, ordered the sterilization of Carolyn Wade upon the petition of a county welfare worker. Statutory authority for such sterilization had been specifically repealed years prior to the issuing of the order. As a Probate Court, the judge in *Wade* possessed limited jurisdiction, was not a court of general, exclusive jurisdiction and his subject-matter jurisdiction to act at all had been removed by the repeal of the statute. As is pointed out by the Federal District Judge in his Memorandum of Decision and Order (Appendix to Petition for Writ of Certiorari, A7):

> "No such limited jurisdiction is in issue in this case."

The only situations in which judges have not been granted judicial immunity are those, as in *Wade* v. *Bethesda Hospital, supra,* in which the act of the judge has been specifically proscribed, the court's jurisdiction specifically removed or where the judge's act was not a judicial function. *Luttrell* v. *Douglas, supra; Spires* v. *Botteroff, supra; Lynch* v. *Johnson,* 420 F. 2d 818 (6th Cir. 1970); *Yates* v. *Hoffman Estates,* 209 F. Supp. 757 (N. D. Ill. 1962).

VIII.

THE OPINION OF THE COURT OF APPEALS IS ERRONEOUS BECAUSE IT IGNORES, CONFLICTS WITH AND REPRESENTS AN UNWARRANTED DEPARTURE FROM THE STATUTORY AUTHORITIES OF THE STATE OF INDIANA AND THE PRECEDENT OF THIS COURT.

An examination of the Petition in question discloses that the court's Approval does not obligate Linda Sparkman to submit to sterilization or obligate the doctor or hospital to perform the tubal ligation. The Petition itself does not expressly ask for anything but the court's approval, referring to tubal ligation. Clearly, the Petition falls within the area defined by the statute conferring jurisdiction (I. C. 1971, § 33-4-4-3), "of all other causes, matters and proceedings . . ." upon the DeKalb Circuit Court. The Court of Appeals ignores this fact. Previous discussion in this Brief sets out the existence of other statutes permitting a mother to consent to have surgery performed upon her minor, that this consent was given by Ora McFarlin, and that the court had jurisdiction to thereby act upon said Petition because of its general jurisdiction over the subject-matter thereof. Again, the presence and effect of the statute is ignored by the Court of Appeals.

Additionally, as previously stated, the Court of Appeals' suggestion that because "the Petition and Order were never filed in court" Judge Stump placed himself, presumably, in a position of clear absence of jurisdiction to deal with the Petition. This

statement is unsupported by any authority and is an unreasonable conclusion.

When the Court of Appeals construed the effect of *A. L.* v. *G. R. H., supra,* it abandoned all pretence of considering whether Judge Stump had jurisdiction over the Petition in question. The court, in *A. L.* v. *G. R. H., supra,* had to have jurisdiction to deal with the mother's Petition at all. The Court of Appeals' statement "if the opinion implies anything, it is that no jurisdiction to order sterilization exists" (Appendix to Petition for Writ of Certiorari, p. A13) confuses the merits of the action with the court's jurisdiction to deal with it.

For these reasons and those previously set forth in this Brief, the Opinion of the Court of Appeals is erroneous. If allowed to stand, the standards set forth for the application of the doctrine of judicial immunity in *Bradley* v. *Fisher, supra,* and *Pierson* v. *Ray, supra,* would be rendered meaningless. The Court of Appeals would in their place substitute standards which would require a court of general jurisdiction to act only pursuant to some specific and affirmative legislative or judicial grant of authority before jurisdiction could be found.

It is respectfully submitted that if the standards for the application of the doctrine of judicial immunity set forth in *Bradley* v. *Fisher, supra,* founded as they are upon the concept of "jurisdiction", are to be changed, that change should be brought about by the legislatures of the states who conferred jurisdiction upon its county courts originally. If the people of the State of Indiana choose to restrict or limit the jurisdiction of their county courts, that should be their sole prerogative, as well as the converse. To permit the Court of Appeals' Opinion to stand as declarative of the standards for the application of the doctrine of judicial immunity in the State of Indiana is unreasonable.

CONCLUSION.

The pronouncements set forth in *Bradley* v. *Fisher, supra,* more than one hundred years ago remain unchanged and are here again repeated:

> "But where jurisdiction over the subject-matter is invested by law in the judge or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case. Although upon the correctness of his determination in these particulars the validity of his judgments may depend." (20 L. Ed. 651.)

Bradley further requires that in the remote event of a clear absence of jurisdiction over the subject-matter, that fact must be known to the judge. Nothing in the record presented to the Circuit Court of Appeals permitted that court to reach the conclusion that Judge Harold D. Stump knew that he had no jurisdiction to consider the Petition in question nor to act thereon.

Approval of the Petition was a judicial act undertaken by the court pursuant to the powers conferred upon it by the statutes of the State of Indiana hereinbefore set forth. The bland, unsupported statement by the Court of Appeals, to-wit: "There are actions of purported judicial character that a judge, even when exercising general jurisdiction, is not empowered to take.", (Appendix to Petition for Writ of Certiorari, p. A14) is typical of the sophistry which characterizes the entire Opinion and, like the entire Opinion itself, contrary to all established precedent. The Memorandum of the United States District Court for the Northern District of Indiana, Fort Wayne Division (Appendix to Petition for Writ of Certiorari, pp. A1 through 7), properly found that Judge Stump possessed the jurisdiction to act, that the act was a judicial function, and that Judge Stump was therefore immune.

Implicit within the policy foundations of the doctrine of judicial immunity lies a recognition that human beings invariably fail in their attempts to mete out as nebulous a thing as "justice" in every case. Additionally, there is a recognition that judges are entirely human. Lofty pronouncements framed in the most prolix phrases betray their own insufficiency and paucity of substance.

Judges occupy positions in our society upon which the people, through their constitutions and statutes, have conferred more authority than upon any human beings on the face of the earth who live in democratic societies. Judges, by their judicial pronouncements, perpetrate an aura of deism which surrounds the bench. The aura is essential to the maintenance of respect for the judicial institution and that respect must be maintained even though an individual act committed by a man in the judicial robe be lacking in a demonstration of fervent intellectual analysis of the consequences thereof.

If the critics of the relatively simplistic doctrine of judicial immunity are to have their way, Judge Stump would be held civilly liable because he failed to implement fundamental procedures of notice, appointment of guardian *ad litem* and holding a formal hearing. That failure, it must be inferred occurred only because the judge was asked to approve and not order. Depending upon the focus of the analysis of that distinction, one may attach great weight and considerable compassion to the act since it required nothing of anybody and carried with it no power of sanction should it have been ignored. It required no giving of notice and could not have been the basis of an appeal.

No supportable contention has been made that Judge Stump acted other than for the child's best interests. To hold that he acted in the clear absence of all jurisdiction and with knowledge of that fact, is without basis in law or fact.

The relief Petitioners seek is a reversal of the Decision of the Court of Appeals and an affirmation of the Order entered

May 13, 1976 by the United States District Court for the Northern District of Indiana, Fort Wayne Division.

Respectfully submitted,

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